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Supreme Court of the United States

OCTOBER TERM, 1959

No. 614

R. M. STRICKER,

Petitioner,

versus

J. P. MORGAN, ET AL., (MRS. MARGARET KOEHLER MORGAN, EDWARD C. MORGAN AND EVELYN MORGAN WIEMER), SUBSTITUTED AS RESPONDENTS IN THE PLACE AND STEAD OF J. P. MORGAN, DECEASED,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

OPENING STATEMENT.

This is the same old story. For fifteen years a person owns land of relatively small value, his title and possession being undisputed. Oil is then discovered, the value booms, and then comes the forgotten claims of ownership.

In this case Petitioner Stricker sought to and failed to prove a shotgun type of claim to land located in Louisiana. The well-reasoned opinion of the District Court contains a full statement of the facts and a complete application of the law, and was made after weeks of trial and a careful study of all of the evidence. The factual statement contained in Stricker's Petition (pp. 5-30) conveniently ignores the entirety of the evidence. (R. Vol. 12, p. 2282.) (*R. M. Stricker v. J. P. Morgan, et al.*; 158 F. Supp. 830 (1958).) A careful review of the decision of the Trial Court was made by the Circuit Court and the Trial Court was in all things sustained. (*R. M. Stricker v. J. P. Morgan, et al.*, 268 F.2d 882 (CCA 5th; 1959).)

II.

JUDICIAL PROCEEDINGS.

A.

In the District Court.

The opinion of the Trial Court is quite lengthy and will not be reproduced here. The full opinion may be found at page 1 of Appendix I to Petition of Stricker.

In short, the Trial Court found that there was no partnership agreement between Petitioner Stricker and Respondent Morgan and that Petitioner Stricker knew and understood at all times that he had no interest in the land.

Here follows a summation of the Trial Court's findings:

"In short I make the following finding of facts and conclusions of law:

1. There were no written or oral articles of partnership agreement between plaintiff and defendant as concerns the operation of Esperance Plantation nor did such agreement arise from a course of dealings between the parties. Plaintiff knew and understood that he had no interest in Esperance Plantation beyond a participation in the profits from the sale of the timber.

2. In all his dealings with defendant plaintiff conducted himself as a broker or middleman and accepted a commission or bonus from others in negotiating sales or oil and gas leases for other parties or property in which defendant had an interest with plaintiff.

3. Plaintiff within his books and records or upon his income tax returns never treated any income received from the various deals and transactions between him and defendant as partnership income. Moreover, the method of handling the transactions by the parties negatives the existence of any partnership agreement between plaintiff and defendant. Each transaction stood on its own facts and was separate and distinct from any other transaction.

4. Plaintiff knew and understood from the date of the purchase of the Esperance Plantation that he had no interest in the land beyond a share in the profits from the sale of the timber.

5. Plaintiff claimed no ownership of the Esperance land in a letter in 1948 to the Internal Revenue Service, nor in the oil, gas and mineral lease existing on the land.

6. Defendant has had the record title and has been in full, open possession of the Esperance Plantation since December 30, 1940 and has exercised all incidents of ownership in connection with the Esperance land from that date.

The plaintiff having failed to meet the burden of proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff."

The Trial Court further found that from the facts, circumstances and conduct of the parties that Petitioner Stricker failed to meet his burden of proof and was not entitled to recover upon any theory advanced by him.

"The fair inference from all the facts, circumstances and conduct of the parties is that there was no general partnership agreement in existence between plaintiff and defendant, nor did any such relationship arise from the dealings between the parties. Plaintiff accepted additional commissions and bonuses in the negotiation of oil, gas and mineral leases in transactions in which Plaintiff and defendant were involved. These commissions and bonuses were over and beyond the share of defendant in the bonus and delay rentals from these leases. Plaintiff never accounted to defendant for these commissions, nor did he offer to share them with defendant."

B.

In the Circuit Court.

The Fifth Circuit Court of Appeals reviewed the decision of the Trial Court and affirmed it in all particulars. The Full Opinion of the Court may be found in Appendix V, page 33 to Petition of Stricker.

The Court in short held:

"In an exhaustive, well written and documented opinion the district judge decided all of the issues in favor of defendant and against plaintiff, and reference is made to his opinion in the case of Stricker vs. Morgan, D.C., 158 F. Supp. 830. The facts are fully and fairly stated in said opinion and, no good purpose would be served by repeating them here. A reading of the briefs and this voluminous record fails to convince us that the court below was clearly erroneous in its findings of fact, which are thus summarized on the last page of the opinion (at page 842):

'There were no written or oral articles of partnership agreement between plaintiff and defendant as concerns the operation of Esperanza Plantation nor did such agreement arise from a course of dealings between the parties. Plaintiff knew and understood that he had no interest in Esperanza Plantation beyond a participation in the profits from the sale of the timber.

'In all his dealings with defendant plaintiff conducted himself as a broker or middleman and accepted a commission or bonus from others in

negotiating sales or oil and gas leases for other parties or property in which defendant had an interest with plaintiff. * * *

"Plaintiff knew and understood from the date of the purchase of the Esperanza Plantation that he had no interest in the land beyond a share in the profits from the sale of the timber. * * *

"Defendant has held the record title and has been in full, open possession of the Esperanza Plantation since December 30, 1940 and has exercised all incidents of ownership in connection with the Esperanza land from that date.

"The plaintiff having failed to meet the burden of proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff."

"These facts as found by the court would require a judgment for the defendant whether the rights of the parties were governed by Mississippi law or by Louisiana law."

III.

ARGUMENT

Position 1.

All Issues of Fact were Decided Adversely to Petitioner Stricker by Both the Trial Court and the Circuit Court.

The Trial Court after patiently and thoroughly listening to and observing all of the testimony, personally and exhaustively examining all of the correspondence

documents, books and records, hearing lengthy oral arguments and studying voluminous briefs found all issues of fact against Petitioner Stricker, holding as follows:

> "The plaintiff, having failed to meet the burden of proof and show by a preponderance of the evidence that he is entitled to recover, the complaint will be dismissed at the cost of plaintiff."

The Circuit Court again reviewing the transcript of testimony and all of the exhibits, studying the voluminous briefs of counsel and hearing the oral argument of counsel likewise found the issues of fact adversely to Petitioner Stricker and affirmed the conclusion of the Trial Court.

> "The conclusions reached by the court below were required by law if the facts found by it were supported by the evidence; so that the fundamental question before us remains throughout whether its findings of fact were clearly erroneous. As heretofore stated, we think that its findings were supported by credible evidence. The factual situation with which it dealt was quite involved and the court set forth its findings clearly and in detail in its published opinion. Being convinced from a careful examination of the record and the exhibits that the findings were justified, we decline to set them aside under the clearly erroneous rule."

It is the firmly established rule of this Court that it will accept concurrent findings of the District and Circuit Courts supported by sufficient evidence. *The Linseed King*, 285 U.S. 502, 52 S.Ct. 450 (1932); *Chees-*

borough v. Woolworth, 244 U.S. 72, 37 S.Ct. 579 (1915); *Porto Rico Fertilizer v. Gandia*, 263 U.S. 711, 44 S.Ct. 37 (1923); *Universal Joint Company v. Cadillac*, 299 U.S. 51; 57 S.Ct. 81 (1936).

The Circuit Court commented upon the full opportunity given to Petitioner to meet his burden of proof:

> "This case was presented to the court below—as well as to us—with unusual skill and diligence by the attorneys on both sides. The trial lasted many weeks and recesses were taken so that the parties would have the best possible opportunity to make the fullest presentation of their evidence. The record presents a typical case for the application of the rule which invests the findings of fact by the trial court with the weight which attends the regard appellate courts accord to its opportunity to judge of the credibility of the witnesses.
>
> "Being unable to say that the findings of the court below, so well and fully stated by it, are clearly erroneous, its judgment is
>
> "Affirmed."

As pointed out by the Circuit Court, it fully concurred in the findings of fact of the District Court and this Court should accept those findings.

Position 2.

Even if there had been no Issue of Fact Decided Against Petitioner Stricker the Louisiana Law Governs and Demands a Writing.

A.

The Louisiana Law Applies.

The land in controversy is located in Louisiana.

It has been a basic and fundamental rule of law that where title to real estate is in issue the laws of the state of its situs govern.

This basic rule is set out in *11 American Jurisprudence*, p. 331 at paragraph 31 as follows:

> "From the general principles heretofore stated it naturally follows that all instruments affecting the title to real estate, no matter what their nature, must be governed, as to their execution, construction, and legal sufficiency, exclusively by the laws of the state in which the real estate is situated."

See *Goodrich On Conflict of Laws*, West Publishing Company, St. Paul, Minn., 2nd ed. 1938, page 388.

The Court in *Freedman v. Mass. Mut. Life Insurance Co.*, 81 F.2d 698 (1936) also held:

> "(1) The solution of this question depends upon a preliminary consideration as to whether the law of Michigan is applicable. Appellant attacks the re-

ceivership upon the ground that the contract assigning the rents and providing for receivership is invalid. *This contract was made with reference to specific real property situated in Michigan, and therefore is peculiarly local in character. Federal courts apply the law of the state in which land is situated as to the validity and effect of contracts concerning such land and affecting the title thereto.*" (Italics ours.)

See also *Pennsylvania Company v. Philadelphia Inquirer Co.*, 25 F.2d 701 (1928) and *Thaddeus W. Spindle v. John M. Shreve, et al.*, 112 U.S. 542, 28 L.ed. 512 (1884).

In the instant case the Esperanza transaction took place and was closed in Vidalia, Louisiana. If there was any agreement concerning the purchase of Esperanza, it necessarily took place in Vidalia, Louisiana.

From the authorities, it is settled that all questions concerning the conveyance of Esperanza Plantation, its form and its effect, must be answered by the rules of the law and evidence as pertains to the jurisprudence of the State of Louisiana.

B.

There Must be a Writing.

It is the law in Louisiana that in the absence of a writing, parol evidence is not admissible to establish title to land in Louisiana.

Section 2275 of the *Louisiana Civil Code* provides:

> "*Immovables*—Transfers required to be written—Verbal sales good as between parties on admission by vendor and actual delivery.—Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, *provided actual delivery has been made of the immovable property thus sold.*"

The only time a verbal sale of immovable property can be valid is where there has been actual delivery of the property together with the actual confession of title by the vendor under oath by written interrogatories.

Petitioner Stricker has produced no interrogatories as required by Section 2275 above and there has been no delivery of the land to Petitioner Stricker.

Therefore, since no writing exists, Petitioner Stricker cannot establish title to the Esperanza Land by parol evidence. We repeat, transfers of real property in Louisiana must be in writing.

Section 2276 of the *Louisiana Civil Code* especially sets out the parol evidence rule:

> "*Parol Evidence Relative to Acts*—Admissibility.—Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them or since."

In Section 2440, *Louisiana Civil Code*, it is provided that sales of immovables can only be made by an authentic act. Any verbal sale of immovables is null and void. Here is the wording of Section 2440:

> "*Immovables—Sale—Method—Verbal Sales.*—All sales of immoyable property shall be made by authentic act or under private signature.
>
> "Except as provided in Article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

It can readily be seen that the *Louisiana Civil Code* recognizes no transfer of immovable property that is not made by authentic act. The conveyance speaks for itself and parol evidence is not admitted to establish title to land.

The strictness of the rule in Louisiana is pointed out in *Fontenot v. Lideau*, 191 La. 540, 186 So. 21 (1938), *Harvey v. Rideau, et al.*, 200 La. 97, 7 So.2d 674 (1942), and *Cernich v. Cernich*, 210 La. 421, 27 So.2d 266 (1946).

In the case of *Smith v. Bell*, 224 La. 68, 68 So.2d 737 (1953), the Court held:

> "It is the well-settled and unbroken rule of law in this state that, in the absence of any allegation of fraud or error, conditions and stipulations beyond those expressed in an authentic act and what may have been said before, or at the time of or since the execution thereof, can be

> proven only by means of a counter-letter or by the use of interrogatories on facts and articles." *Frauton v. Rusca*, 187 La. 578, 175 So. 66, 68 and *Lawrence v. Claiborne*, 215 La. 785, 41 So.2d 680, and authorities cited in both cases."

In the instant case, Petitioner Stricker did not plead or prove the existence of a counter letter or the use of interrogatories to establish his title, but depended entirely on a proving of his interest in and to the Esperanza Land by parol testimony. (Petition, p. 7)

As set forth by the Court in *Smith v. Bell, supra*, the unbroken law of the State of Louisiana does not permit this to be done.

Petitioner Stricker cannot resort to parol testimony.

In *Prescott, et al. v. Prescott, et al.*, 170 La. 23, 127 So. 611 (1930), the Court declared:

> "Parol evidence is inadmissible to create a title in one who never owned the property or to show that the vendee was in reality some other person than the person named in the deed."

A very fine review of the parol evidence rule is found in the case of *Ceromi v. Harris*, 187 La. 701, 175 So. 462 (1937). There the Plaintiff asked to be decreed an owner of a portion of the real property. Plaintiff tried to prove a verbal agreement to establish his claim to an interest in the land. The Court held:

> "Parol evidence to prove defendant's ownership of the property in dispute was properly rejected

by the trial judge. It is axiomatic under the law and jurisprudence of this state that parol evidence is inadmissible to create a title in one who never owned the property or to show that the vendee was in reality some other person than the person named in the act of sale. Civil Code Articles 2275, 2276, 2292, 2440; *Hanby vs. Texas Company*, 140 La. 189, 195; 72 So. 933; *Hodge vs. Hodge*, 151 La. 612; 92 So. 134; *Eberle vs. Eberle*, 161 La. 313, 108 So. 549; *Succ. of Prescott*, 170 La. 233, 127 So. 611; *Landner vs. Cotonio*, 175 La. 352, 143 So. 286.

"And it has been held that the rule finds no exception in the case of a purchase of real estate by an agent with funds alleged to belong to his principal. *Hackenburg vs. Gartskamp*, 30 La. Ann. 898; *Perrault, Tutrix vs. Perrault*, 32 La. Ann. 635; *Stierle v. Kaiser*, 45 La. Ann. 580, 12 So. 839.

"Even where real estate is acquired with stolen money the owner of the money does not become the owner of the property. *George vs. Campbell*, 26 La. Ann. 445.

"The case of *Heiss vs. Cronan*, 42 La. Ann. 213 is analogous to the instant case. In that case plaintiff sued to be recognized as co-proprietor with the defendant to the extent of an undivided half interest in a tract of land purchased in defendant's name at a syndic's sale. The petition alleged that the purchase was made in the name of defendant for the joint interest of defendant and plaintiff, but that defendant fraudulently withheld the property and claimed the whole. Plaintiff offered to prove by parol evidence the verbal acknowledgments of defendant that the facts were as alleged in the peti-

tion. This Court held that the evidence was properly excluded, and that the allegation of fraudulently denying the original bargain did not take the case out of the rule, for a verbal agreement of this sort, touching immovable property, was only capable of being enforced at law when the party to be charged confessed it on oath, and when delivery had been made. Every refusal to carry out an oral agreement for the conveyance of land might in one sense be charged to be fraudulent, and thus the rule would be made nugatory."

Here again the Court has set forth to establish title to real property by verbal agreement, in Louisiana, the party would have to admit the title of the party claimant. There is no other way to establish title to real property in Louisiana by parol evidence.

C.

There Could Have Been No Partnership Or Joint Adventure In The Esperanza Lands In Louisiana.

If the partnership in Louisiana be as to the ownership of land, there must be written, recorded articles of partnership. Section 2836 of the *Louisiana Civil Code* especially provides for the written articles as follows:

"2836 (2807). *Part of Stock in Real Estate*—Written agreement and recordation required.—If any part of the stock of this partnership consist of real estate, it must be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded as is hereafter

prescribed with respect to partnership in commendam."

The above section provides not only for written articles of agreement, but they must also be recorded.

Section 2846 of the *Louisiana Civil Code* provides for the contents of the written agreement. Section 2847 for the time allowed for recording and Section 2848 where the articles of partnership should be recorded and that must be done in the parish wherein the land is situated.

Thus from the hereinabove Sections of the Civil Code where partnerships in land in Louisiana are concerned there must be proper written articles of partnership agreement between the parties duly recorded within six days of the date of the agreement in the parish where the land is located.

The Louisiana authorities support this position. *Dunbar v. Bullard*, 2 La. Ann. 810 (1847); *Slocomb v. De Lizardi*, 21 La. Ann. 355 (1869); *Pecot vs. Aronelin*, 21 La Ann. 667 (1869); *Murrell v. Murrell*, 33 La. Ann. 1233; *Lagarde v. Dabon*, 155 La. 25, 98 So. 744; *Gray v. Carter*, 176 So. 885. *Gadlin v. Deggs*, 23 So. 2d 704 (1945).

Again in the case of *Succession of Chapman*, 225 La. 641, 73 So.2d 789 (1954) the Court eliminated the possibility of a partnership in lands in Louisiana because there were no written articles of partnership between the parties. Here are the words of the Court:

"The evidence in the record regarding the existence of a partnership and the farming operations on the lands being conducted by the partnership is very indefinite and insufficient to base a conclusion thereon. Moreover, there was no compliance with Article 2836, LSA-C.C., requiring that if any part of the stock of a partnership consist of real estate *it must be in writing and recorded in the parish where the property is situated.*"

It has been held in Louisiana that the relation of joint adventurers is governed by the same principles constituting the law of partnership.

In the case of *Illinois Central Railroad v. Pope Construction Company*, 90 So.2d 139 (1956) the Court had to decide whether plaintiff and defendant therein were partners or at least joint venturers. There was also an attempt to establish the relationship by proof of a course of conduct.

The Court said:

"(2) We have no doubt that the liability of joint adventurers is the same as is that of partners and accordingly we agree with the statement of our Brothers of the Second Circuit who, in *Young v. Reed*, La. App., 192 So. 780, 785, said:

"'The relation of joint adventurers is governed by the principles which constitute and control the law of partnership.'

In **W & W Oil Co., Inc. v. American Supply Co.**, La. App., 2 So.2d 384, 385, the same court said

> * * * The agreement being for a joint venture is in legal parlance an "ordinary partnership" and governed by the laws applicable to ordinary partnerships.'"

In other words, a joint adventure in the ownership of lands in Louisiana would follow the same rules as to the necessity of a writing and recordation as provided in the statutes on partnerships in lands in Louisiana.

It follows that to allow the introduction of parol evidence, to establish title to land by calling a transaction a joint venture instead of a partnership would entirely defeat both the parol evidence statutes in Louisiana, as well as those for partnerships whose stock would consist of real estate.

The Court so clearly pointed this out in *Stack v. DeSoto Properties*, 221 La. 384, 59 So.2d 428 (1952). In this case it was contended by Stack that since the undertaking was in the nature of a joint venture, that he could use parol evidence to establish his interest. But the Court held:

> "Counsel for plaintiff further insist that, since there was a joint adventure for the acquisition and development of the plantation, Stack, Sr. is entitled to have his interest recognized and that resort to parol evidence is 'permissible for this purpose.'
>
> "There is no merit in the point. To begin with, an examination of the letter of Gilliland readily discloses that there was a joint adventure only insofar as concerns the men engaged in financing the project. Stack, Sr., had rendered services for which

he was to receive an undivided one-half interest in the property, subject to the contingency above pointed out. He was not a partner; he assumed no responsibilities, and was not in anywise liable for the debts of the enterprise. In addition, even were it otherwise, Stack, Sr., could not be permitted, in view of Articles 2275, 2276 and 2440 of the Civil Code to introduce parol evidence to prove an interest in the plantation, *Cernich v. Cernich*, 210 La. 421; 27 So.2d 266, or even to show a waiver of the suspensive condition, *Di Cristina v. Weiser*, 215 La. 1115, 42 So.2d 868."

Even in the *Stack case, supra*, where there was a letter agreement setting out the understanding of the parties, the Court refused to substitute the letter for the requirement that all transfers of property in Louisiana must be in writing. (See *Section 2275, Louisiana Civil Code.*) The Court further held that parol evidence could not be used to add anything further to the letter agreement. (*Section 2276, Louisiana Civil Code.*)

The Court further in the *Stack case, supra*, found that the letter agreement could not be substituted for a transfer of immovable property which can only be made in Louisiana under the terms of Section 2440 which reads:

> "2440 (2415) (N° 1582). *Immovables—Sales—Method—Verbal sales.*—All sales of immovable property shall be made by authentic act or under private signature.

"Except as provided in Article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

Position 3.

Petitioner Stricker is Barred by Prescription and Laches.

The record shows that the deed to the Esperanza Land was made on Decem[illegible] 30, 1940. The oil lease was executed on December [illegible] 1941.

Plaintiff did not bring this action until October, 1955, a period of fifteen years from the date of the deed and fourteen years after the execution of the oil lease. In the meantime, Respondent Morgan moves into his last illness, witness Laub dies, witness Barchus dies, and the memories of many have been dimmed by the passage of time.

There is a 10 year prescription period in Louisiana as set forth in *Section 3474* of the *Louisiana Civil Code*:

"3474 (3437) *Good faith possessor holding by just title—Prescriptive period.*—Immovables are prescribed for by ten years, when the possessor has been in good faith and held by a just title during that time."

Article 3478 of the *Louisiana Civil Code*, provides:

"3478 (3442) (N. 2265) *Good faith possessor by just title. Interdicts, married women, absentees.*

and minors.—He who acquires an immovable in good faith and by just title prescribes for it in ten years. This prescription shall run against interdicts, married women, absentees and all others now excepted by law; and as to minors this prescription shall accrue and apply in twenty-two years from the date of the birth of said minor; provided that this prescription, once it has begun to run against a party, shall not be interrupted in favor of any minor heirs of said party. (As Amended. Acts 1920, No. 161; 1924, No. 64.)"

Respondent Morgan has been in full possession of the property for a period in excess of ten years and therefore Petitioner Stricker is barred by limitations and by laches.

As to the question of laches, we quote from the Court in the case of *Comans v. Tapley*, 57 So. 567 (1912):

"(3) The doctrine of laches is founded principally upon the equity maxims 'He who seeks equity must do equity,' 'He who comes into equity must come with clean hands,' and 'The laws serve the vigilant and not those who sleep over their rights.' Its object is to exact of the complainant fair dealing with his adversary. According to Mr. Pomeroy, with whom we fully agree, this doctrine cannot be more concisely and accurately stated than in the language of Stiness, J., in *Chase v. Chase*, 20 R.I. 202, 37 Atl. 804: 'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another.'"

One of the first principles set forth by the Court in *Comans v. Tapley, supra*, upon which the doctrine of laches is founded is "He who comes into equity must do equity"; "He who comes into equity must come with clean hands".

What did Petitioner Stricker do?

1. Objected to the payment of any part of the expenses attributable to the Esperanza land.
2. Collected lease commissions and special bonus monies from parties in transactions which he and Respondent Morgan were interested without reporting or sharing such income.
3. Collected from Respondent Morgan commissions from transactions which Respondent Morgan was interested in.

How did such a long delay of Petitioner Stricker in filing this action work a disadvantage to Respondent Morgan?

1. Two parties involved in the original transaction of purchase of the Esperanza property have passed from this world.
2. Respondent Morgan has been adjudged an interdict at the time of the trial in the Trial Court and has since passed from this earth.
3. The memory of the witnesses cannot be accurate after the expiration of fifteen years.
4. The destruction, loss and misplacement of books, records and memoranda dating back over such a long period of time is inevitable.

It has been held that an alleged partner asking for an accounting after the expiration of eleven years is barred by laches. See *Marks v. Toney*, 18 So.2d 452 (1944).

The doctrine of laches is well recognized in the State of Louisiana. In *Ziemer, et al. v. City of New Orleans*, 197 So. 754 (1940) the Court said:

> "The Court has recognized estoppel by laches in a number of cases and the doctrine is well established in this State."

Position 4.

There was no Partnership Relationship Existing Between Petitioner Stricker and Respondent Morgan in Reference to the Esperanza Timber.

Timber is severable from the land and when separated becomes a separate estate. Act 188 of 1904 provides:

> "Standing timber shall remain an immovable and be subject to all the laws relative to immovables, even when separated in ownership from the land on which it stands." (*Louisiana Revised Statutes of 1950, 9:1103.*)

The Eperanza timber had been separated from the land at the time of its purchase as shown by the following:

1. A separate consideration was paid for the timber.

2. The timber was acquired separately from the land.

3. The timber was assessed separately from the land and the ad valorem taxes pro rated between the timber and the land.

4. The parties treated the timber as a separate and distinct transaction from the land.

The Louisiana cases recognized that Act 188 of 1904 created two distinct estates—one in the land and one in the timber.

In the case of *Bagents vs. Crowell Long Leaf Lumber Co.*, 20 So.2d 641 (1945), the Court found.

"This separate tenure of different estate is nowhere provided for in our Civil Code which recognizes but two kinds of estates in land, the one corporeal and termed ownership, being the dominion over the soil and all that lies directly above and below it (C. C. Art. 505); and the other incorporeal and termed servitude (including usufruct) being a charge imposed upon the land for the utility of other lands or persons. (C. C. Arts. 533, 646, 647.) See *Wimple vs. Nabors Oil Co.*, 154 La. 483, 97 So. 666, 667. It finds its basis only in the statutory law and enacted by Act No. 188 of 1904, which provides that standing timber shall remain an immovable, and be subject to all the laws * * * * on the subject of immovables, even when separated in ownership from the land on which it stands * * * * *.

"The Supreme Court of our State has on numerous occasions stated that the effect of that Statute was to create two distinct estates and it has re-

cently reaffirmed the doctrine in the case of *Clark vs. Weaver Bros. Realty Corporation*, 197 La. 63, 200 So. 281."

See also:

"*Cooley vs. Meridian Lumber Co.*, 1940, 195 La. 631, 197 So. 255; *Smith vs. Hunt-Lodge Lumber Co.*, 123 La. 959, 49 So. 655, 656; *Brown vs. Hodge-Hunt Lumber Co.*, 162 La. 635, 110 So. 886; *Gray vs. Edgar Lumber Co.*, 138 La. 906, 70 So. 877; *Simmons vs. Tremont Lumber Co.*, 144 La. 719, 81 So. 263; *Kavanaugh vs. Frost Johnson Lumber Co.*, 149 La. 972, 90 So. 275."

It can be seen that Act 188 of 1904 makes the timber that has been separated an immovable and subject to all of the restrictions surrounding conveyances of land.

Petitioner Stricker having failed to conform to these restrictions can have no partnership interest in this immovable.

The fact that Respondent Morgan divided profits with Petitioner Stricker does not make him a partner in the Esperanza timber deal.

The Supreme Court of Louisiana so held in *Collum v. Bruning*, 49 La. Ann. 22 So. 744 (1897):

"Partnership is a special contract, dependent for its creation upon the consent of the parties (Rev. Civ. Code, art. 2805) that that particular relation should be established between them. The mere fact that two persons may both be interested

pecuniarily in the same business venture, and that each gave to it equally his time and attention, by no manner of means carries with it, as a matter of law, the conclusion that they stand towards each other as partners. Consent shown by one person, who has furnished the capital by which certain operations are carried on, that another, who has employed his time, his skill, and his services for their success, should receive one-half of the profits to be derived from the same, is perfectly consistent with the fact that the latter person stands towards the former as a mere employe."

See *Leonard v. Sparks, et al.*, 109 La., 33 So. 594 (1903); *Shushan Bros. v. Drennan & Co., et al.*, 158 La., 104 So. 214 (1925); *Reel v. Brewer*, 6 So.2d 99 (1942); *Glover v. Mayer*, 209 La. 599, 25 So.2d 242 (1946), where the Louisiana courts have held that "merely to divide the profits, or to share profits and loss in speculation or adventure does not make parties partners inter sese, nor will they be liable as such".

In *Labat v. Labat*, 95 So.2d 129 (1957), the Court had under consideration the following strong set of facts and held as follows:

"Appellee in support of his contention that a partnership existed between him and his mother points out that they lived together on the premises, that both had access to the business records, that they had joint bank accounts, that occupational licenses from the city and the state were issued to 'Emile Labat, Jr. and Mrs. Emile Labat', and that they filed partnership income tax returns. All of

these facts may be persuasive, but they are by no means conclusive. The real question is whether as between them there was an intention to establish a patnership. A reading of this record shows no indication that these two parties ever had any intention of entering into a partnership contract. Certainly appellant never consented to enter into such a partnership, and her son never treated her as a partner. What is clear is that after the death of Emile Labat, Sr., the son assumed control of all the community property left by the father, collected the rents, and managed the funeral business as he saw fit."

Here, Petitioner, Stricker certainly never treated Respondent Morgan as a partner. Never did Petitioner Stricker report partnership income upon his income tax returns with Respondent Morgan. Petitioner Stricker consistently took commissions in transactions involving the parties without reporting to Respondent Morgan.

IV.

RESPONSE TO PETITION OF STRICKER.

A.

PETITIONER'S ERRONEOUS FACTS.

The Petition filed herein by Stricker is an intransigent thing. It is difficult, if not impossible, within a reasonable space to answer in any chronological or detailed manner. It contains so many errors of fact, so

many invalid assumptions, and ignores so much of the record that it would be a Herculean task to refer the Court to each and to refute them.

Basically, however, we might point out some of these erroneous assumptions and the fallacies therein apparent. In the first place, it is assumed: "Said agreement entered into by and between Stricker and Morgan on or about November 16, 1935 was a profit and loss sharing contract and agreement which created a status between them that has been denominated by them as a partnership." (Petition, page 7.) Petitioner makes no effort to determine where such agreement was consummated, whether Louisiana or Mississippi.

Inherent in this basic position of Petitioner Stricker is a welter of misconception. The status of a partnership was not created by loose verbiage contained in simple and disconnected correspondence. As the records show and the Trial Court and Circuit Court found, the actions of the parties themselves denied the existence of a partnership and demonstrated that the language was carelessly used.

Nor does this record show the creation of a profit and loss sharing contract or agreement. None such existed. Obviously, all that occurred was that Petitioner Stricker brought to Respondent Morgan a deal (Walnut Grove) which Respondent Morgan decided to finance.

As normally occurs in these things, Petitioner Stricker more than likely casually told Respondent Morgan he might be able to find and bring some more to him and like any ordinary person Respondent Morgan probably told him that he'd be glad to look them over and go into them if they appealed to him. This is all that could have taken place from the very nature of things.

There is nothing in this record to show a general agreement to share in the profits and losses equally. It was pointed out by the Trial Court and the Circuit Court in considerable detail the many different arrangements made by the parties in the various deals and we will not now repeat them.

Out of all of the tremendious amount of correspondence and data Petitioner Stricker hangs his hat on only one letter of Respondent Morgan wherein he is referring to the Knox or Point Breeze timber in Concordia Parish, Louisiana, purchased in December, 1940. (See page 3 of the Petition). This reed is too thin for Petitioner Stricker to lean on, much less build a case.

There is considerable confusion as to just who were involved in the Knox or Point Breeze transaction and on what percentages. Apparently, one Packard, Petitioner Stricker, Respondent Morgan and one Ed Dwyer were all mixed up in it. (Def. Ex. 103) (R. Vol. II, p. 2024) (Pl. Ex. 154 p. 22)

In his income tax returns for the years 1941, 1942, 1943 and 1944, Petitioner Stricker reported simply under "List of Profits", "1/2 Profits on Knox Logs to Mengel Company". (Def. Ex. 56, 57 and 58) (R. Vol. 9, pp. [illegible] 1649.) There is no further identification of this income, and no mingling of this item with any other item.

In fact, Petitioner Stricker deducted 50% Capital Gains from his income tax returns. (Def. Ex. 57) (R. Vol. 9, p. 1683.) *The treatment of the profits from timber sales from Point Breeze as a Capital Gain would negative the existence of any partnership between Petitioner Stricker and Respondent Morgan. If the purchase and sale of timber be the business of the partnership, any income would be ordinary income and not a Capital Gain.*

Louisiana Box required some of the timber from Knox or Point Breeze and then records show the payment of commissions to Petitioner Stricker in the sum of .50 per thousand. (Def. Ex. 44) (R. Vol. 7, p. 1213.)

Such payments to Petitioner Stricker contemplate, of course, the idea of a general partnership.

On March 29, 1944, Petitioner Stricker wrote Respondent Morgan in reference to the Knox or Point Breeze Timber, "I have lost hope of ever trading with Grunby, and as it might appeal to you, for you and Grunby to buy my interest out. . . ". (Def. Ex. 103) (R. Vol. 11, p. 2024.)

Stricker further in this letter continues, as follows:

> ". . . you would be sure that Grunby would and could handle the timber, and incidentally since you buy so much *loumber* from Grunby you would be assured of a real certainty of a much bigger profit in the end. I just mention this, as food for thought, so that you and Mr. Grunby can get your heads together: I am willing to sell on the *baises* of $7500.00 for all timber, and since you can make a lot of money individually out of Grunbys *loumber* if he gets it, I would likely take even less, just any thing to help you accumulate as much as possible, you see you need the money and, of course I don't." (Def. Ex. 103) (R. Vol. 11, p. 2024.)

There is no mention of any partnership, in fact, the language of Petitioner Stricker clearly indicates he had an investment in this timber which he was willing to sell to Grunby and Respondent Morgan for a price.

The second basic invalid assumption of Petitioner Stricker is his interpretation of the use of the words "we" and "us" in certain letters (Petition, pp. 10, 18-29.) He contends that such use without further identification means only Petitioner Stricker and Respondent Morgan. In so doing, he ignores that frequently such use was occasioned by Respondent Morgan's inclusion of his partners in Louisiana Box in some instances and with his son alone in others.

Further, Petitioner Stricker ignores the reality of the situation, since as the Trial Court pointed out, wherever Respondent Morgan referred to Esperanza

and his and Petitioner Stricker's alleged interest therein; he made it clear, crystal clear, that Petitioner Stricker had no interest in the land. (For example, in letter of January 20, 1945, Respondent Morgan wrote "... we agreed that I buy the land ...") (Def. Ex. 22.) On January 2, 1942, Petitioner Stricker made no bones about it in his letter to Respondent Morgan wherein he said "I gave John Dale, Jr., *your* oil lease last Tuesday." (Pl. Ex. 37.)

Another basic fallacy on Petitioner Stricker's part is to ignore the fact that the record shows in writing he knew that he brought to Respondent Morgan only the Esperanza timber purchase and that Respondent Morgan was not obligated at any time by anything that Petitioner Stricker had done or that had previously occurred to buy the land.

Petitioner Stricker knew further that Respondent Morgan alone bought the land for his sole ownership thereof. And this fundamental fact is not changed by use of the confusion in every-day correspondence occasioned by virtue of Respondent Morgan's separate ownership of the land and Petitioner Stricker's interest in the profits from the timber.

Naturally, Respondent Morgan did not use extreme care in ordinary correspondence to pinpoint the precise legal technical situation. It would have been extremely unusual and consequently suspicious had he done so. But where he wrote or talked to Petitioner Stricker about it, the record is clear that Respondent

Morgan positively asserted complete ownership of title to the exclusion of Petitioner Stricker.

Again, we repeat that there is no way to reconcile Petitioner's statement of the facts with this record. The Trial Court or the Circuit Court could not agree with them—nor can we. Our failure to specifically point out each and every instance of erroneous statement of fact is due to the enormous size of this record and the many, many items mistakenly referred to as facts by Petitioner.

The Trial Court and the Circuit Court treated the entirety of this record and their findings are amply supported thereby.

Some reference is made by Petitioner Stricker seeking comfort out of alleged admissions as to his interest in the timber. (Petition, pp. 22, 52-53.) The blunt fact is that the pleadings and proof clearly show that no issue was ever made as to the timber. Respondent Morgan admitting from the beginning that Petitioner Stricker was entitled to one-half of the profits from the sale of the timber. The Trial Court fully discussed this situation and concluded from all of the discussion by the attorneys as follows:

> "So that in the present case and on this motion for Request for Admission of Fact, Mr. Brunini has denied the request for admission of partnership, and since there is no written stipulation on it, I will rule that the burden would be upon the plaintiff to prove the partnership and the ownership

of the timber of course is admitted; *but the status in which it was owned is denied.* The burden will be upon the plaintiff to prove the partnership." R. Vol. 4, p. 696.

B.

PETITIONER'S LAW INAPPLICABLE.

Petitioner cites on pages 4 and 31 of his Petition two cases of *Vyens v. Beckle*, 8 Mart. (O.S.) 11 (1820), *Delamore v. Roger*, 7 La. Ann. 152 (1852), *Malady v. Malady*, 25 La. Ann. 448, all involving claims by concubines for the fruits when they contributed money and labor in purchasing property.

Later the courts in Louisiana failed to recognize even this distinction as to title to real property as shown by the case of *Sparrow v. Sparrow*, 231 La. 966, 93 So.2d 232 (1957) found on page 4 and 34 of the Petition.

In the case of *Porter v. Cooke*, 58 F.2d 1033 (1951), 65 F.2d 637 (1933), 127 F.2d 853 (1942, C.C.A. 5th, cited on page 37 of the Petition, the court held specifically that title to land in Louisiana could only be established by a writing:

> "In the first place, it is extremely doubtful as to whether the allegations disclose an ordinary partnership, and clearly, in so far as the mineral lease or any other real property, are concerned, title thereto, under the laws of this state, could only be established by witten evidence. Article 2836 of the *Revised Civil Code of Louisiana*, declares:

"If any part of the stock of this partnership (an ordinary or particular partnership) consists of real estate, it (the contract of partnership) must be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded as is hereafter prescribed with respect to partnership in commendam."

Since there was an allegation that appellants in the *Porter* case, *supra*, had contributed capital to the acquisition of certain real property the court reversed and allowed testimony on that score.

However, on the third appeal by appellants to the court they were again denied relief:

"What was found was that contrary to their allegations that they were partners with Cooke and Gay in an oil development adventure and had paid them monies to invest in it, plaintiffs were not associated with them as partners or joint adventurers, and had paid them no monies, and that Cooke and Gay sustained no relation to them whatever except that of trustee ex maleficio as to the leases and property Emlet, under duress as found by the court, had assigned to them that these leases and properties were worth far less than Cooke and Gay had laid out as consideration for them; and that from their exploitation and development, at Cooke's sole expense, they derived no profit but a heavy loss. That all the profits derived by Cooke and Gay were from properties which, no part of the Emlet leases, had been acquired and developed by them, wholly independent of Emlet. On these facts we think it plain that no other judgment could

possibly have been rendered on the merits than the one that was rendered."

Porter v. Cooke, supra, affirms the position of Respondent Morgan that partnership or a joint adventure in lands in Louisiana must be in writing.

Respondent Morgan sees no applicabilty to the situation found in *Thompson v. Walker*, 235 La. 132, 103 So.2d 65 (1958), found on pages 4 and 39 of the Petition to that here before the Court. There Thompson had record title and uninterrupted possession and though the bank purchased the property of Thompson at a tax sale in 1931, the amount paid by the bank had been charged against Thompson and recovered. Walker purchased the property from the bank in 1943 with full knowledge that the bank never exercised any of the incidents of ownership of the land.

Here, Respondent Morgan exercised all incidents of ownership and Petitioner Stricker none. Respondent Morgan was in full possession. Petitioner Stricker knew and understood at all times he had no interest in the land.

The cases cited in the footnotes by Petitioner Stricker on pages 45 and 46 of his Petition do not in anywise change the Louisiana rule requiring a writing. In fact, the cases there cited involving title to land were based on instruments of writing duly acknowledged and recorded. *Duncan v. Duncan*, 26 La. Ann. 532 (1874) and *Ceramic v. Hass*, 195 La. 1048, 197 So. 752 (1940).

Petitioner Stricker has no counter-letter as urged in his Petition on page 48. The case of *Louis v. Garrison*, 64 So.2d 254 (1953), there cited had a definite letter admitting a life estate in the parties, executed the same date as the deed, and further, actual delivery of the premises had been made to the life tenants.

Petitioner Stricker without a writing cannot escape the provisions of *Section 2275 of the Louisiana Civil Code*. Since there was no delivery, and in fact, uninterrupted possession by Respondent Morgan for a period of fifteen years, Petitioner Stricker could claim no title.

The case of *Morgan v. Hathaway*, 77 So.2d 169 (1955) found on page 51 of the Petition involved the question as to property purchased during marriage, being community property, and the court held that "this presumption can be rebutted only by strong and substantial evidence".

The strong and substantial evidence which the court in the *Morgan case, supra*, considered was a sworn affidavit filed for record in the parish where the land was situated.

The Court found:

> "Although there are several claims whereby each of the parties assert their rights in this matter, we believe that the important point for consideration is the fact that the defendant introduced into evidence an affidavit executed by all the petitioners wherein

the petitioners acknowledged that the property purchased by Mrs. Morgan on September 11, 1935, was the separate and paraphernal property of Mrs. Morgan, and further acknowledging her right to transfer the property, as per the act of sale of December 10, 1935, without the necessity of intervention of her husband, the petitioners' father. The petitioners further acknowledged in the said affidavit that they never did have and do not claim any interest whatsoever in said property as their mother had acquired the same with her separate and paraphernal funds and having disposed of same in a direct and legal manner.

"The record in this matter discloses that the verification of the petition was signed by petitioners' attorney, upon his information and belief. No witnesses, nor evidence, was introduced by petitioners to refute the affidavit which was filed by defendant. The affidavit was made by the petitioners on November 25, 1939 and duly filed for record in Conveyance Book No. 423, folio 309 of the Conveyance Records of the Parish of East Baton Rouge, the parish where the property is situated."

The authorities in Louisiana hold that a counter-letter must be of equal dignity to the act which it sets aside. In the case of *Succession of Curtis*, 100 So. 412 (1924), the court found:

"The rule is consecrated by law and jurisprudence, that, as between the parties to a written act, the only admissible evidence to prove simulation is a counter-letter, which is proof of equal dignity."

Respondent Morgan had sworn duly recorded deed to the land. Petitioner Stricker did not allege the existence of or introduce into evidence any writing that refuted such ownership.

An example of a counter-letter may be found in the case of *Duncan v. Duncan*, 26 La. Ann. 532 (1874) cited on page 45 of the Petition:

> "Know all men by these presents that I, Michael Duncan, of the city of New Orleans, hereby transfer to my sister, Mary Duncan, also living in the city of New Orleans, a certain frame house and lot with all its appurtenances, situated on Camp or Prytania Street, and known as the third house from Calliope street. Said house stands in my name but I have no interest in the same; it belongs to my said sister, Mary Duncan.
>
> 'M. Duncan.'
>
> 'Witness: Edward Duncan.'
>
> "The execution of this act was proved before a notary on June 18, 1870, and duly registered."

An example of a counter-letter may also be found in *29 Tulane Law Review*, 22 (1954):

> "Between the undersigned, A, living at .....
> ..... and B, living at .....
> .....
>
> "It having been noted that, by a act under private signature, recorded on ..... A has sold to B a house located at .....
> for the price of .....,

"This sale having solely the object of facilitating the carrying out of a certain enterprise by B, and being entirely fictitious, the parties hereby contract as follows:

"A and B recognize that the above sale is not real, and that B has not paid, nor A received in part or whole, the price recited as paid in the act of sale.

"The said sale must in consequence be considered as not having ever existed, and A has never been legally deseized of the ownership of the said house, whose rents he will continue to receive by the hands of B, until the moment when he will be put back in possession of the said house."

Petitioner Stricker had no such counter-letter nor is there any evidence in the record, and the Trial Court and Circuit Court so found, that Petitioner Stricker had any interest in the land and in fact, the record amply supports the Trial Court and the Circuit Court in their findings that Petitioner Stricker knew and understood at all times that he had no interest in the land.

The Court in *Glover v. Abney*, 106 So. 735 (1926) rejected as a counter-letter the following affirmation of Abney because no consideration was shown or received by Abney upon its execution:

"Know all men by these presents that, whereas I have purchased from Barcus Hubbard and Mary Glover two hundred and fifty-two (252) acres of land in Caddo parish, as per deed of this date passed before G. L. Jones, notary public in and for Harrison county, state of Texas, I hereby obligate and bind

myself and agree to sell said land back to the said Barcus Hubbard within 5 years from this date for the consideration of one thousand and seven hundred and fifty dollars, payable as follows: One-third cash, and the balance in not more than three notes of equal amounts, due one, two and three years after date, with interest at 8 per cent. per annum from date and retaining a vendor's lien and mortgage on the said land to secure the payment thereof. Said conveyance however, is to be without warranty express or implied."

Petitioner conveniently ignores the Louisiana law as to the necessity of a writing in partnership in land on pages 30-62 of his Petition. For instance, the cases of *Daspit v. Sinclair Refining Company*, 198 La. 9, 6 So.2d 341, and *Pillsbury Mills v. Chehardy*, 231 La. 111, 90 So.2d 797, cited by Petitioner on page 39 of the Petition do not in anyway concern itselves with title to land. The *Daspit case, supra*, involved the controversy by attorneys over the division of attorneys' fees and the *Pillsbury Mills case, supra*, facts had to do with a suit on open account for the proceeds due from the sales of eggs.

The Trial Court and the Circuit Court correctly applied the law.

CONCLUSION.

The Trial Court patiently and thoroughly listened to and observed all of the testimony, personally and exhaustively examined all of the correspondence, documents,

books and records, heard lengthy oral arguments, considered and studied voluminous briefs, and after mature deliberation fairly and justly decided all issues of fact and law against the Petitioner. The record substantiates his findings and conclusions. The Circuit Court in like manner reviewed the record, examined the documents, correspondence and books and records, and further heard the oral argument of counsel and considered and studied voluminous briefs, and affirmed the findings of the Trial Court in all particulars. The findings and conclusions of the Trial Court and the Circuit Court should remain undisturbed. The Petition for Certiorari should be in all things denied, and it is respectfully so prayed.

Respectfully submitted,

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CERTIFICATE.

I, the undersigned, W. H. Talbot, do hereby certify that I have on this date transmitted a copy of the above and foregoing Brief of Respondent, J. P. Morgan, et al., to each of the attorneys of record for the Petitioner, R. M. Stricker, addressed to them at the respective post office addresses as shown of record herein, namely, Messrs. E. Leland Richardson, Gerald N. Sims, John Dale, Jr. of Dale, Richardson and Dale, Baton Rouge and Vidalia, Louisiana, Gerard Brandon of Brandon, Brandon, Hornsby & Handy, Natchez, Mississippi, and Clay B. Tucker, Woodville, Mississippi.

This the .... day of January, 1960.

W. H. TALBOT,
Of Counsel for Respondent,
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